

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RICHARD RAY MEYERS, II,)	CASE NO. BK78-L-429
)	
BANKRUPT)	
)	
MARY PAT SHELEDY,)	
)	
Plaintiff)	
)	
vs.)	
)	
RICHARD RAY MEYERS, II,)	
)	
Defendant)	

MEMORANDUM OPINION

Plaintiff brought this adversary proceeding for a determination that an indebtedness allegedly due her from the defendant was nondischargeable in this bankruptcy proceeding for the reason that the plaintiff allegedly held a cause of action against the defendant for negligence arising out a motor vehicle accident which had not been filed and was not pending at the time of the institution of this bankruptcy proceeding. Accordingly, the plaintiff seeks a determination that the claim which she held was not provable pursuant to §63a(7) [11 U.S.C. §103a(7)] and, therefore, not provable pursuant to §17 [11 U.S.C. §35]. Defendant answered and raised the affirmative defense that the accident occurred on October 10, 1974, and that the plaintiff instituted its negligence proceeding in the Municipal Court of Lincoln, Lancaster County, Nebraska. Defendant asserts that the summons was issued in the Municipal Court action on October 6, 1978. Defendant further alleges that the summons was served upon the defendant by leaving a copy at 1020 Hartley, Lincoln, Nebraska, which was not the usual place of residence of the defendant at the time the summons was left at that address. Therefore, the affirmative defense of the defendant is that the statute of limitations had run and that the plaintiff's claim is now barred by the statute of limitations. At the pretrial conference, the parties agreed to submit the issue of the defendant's affirmative defense by written stipulation if possible. That written stipulation has now been filed.

A summary of the stipulation of fact indicates that the accident occurred on October 10, 1974. On September 14, 1978, the defendant filed this voluntary petition in bankruptcy. On October 6, 1978, plaintiff filed its negligence action in the Municipal Court of Lincoln, Lancaster County, Nebraska. A

summons was issued on October 10, 1978, and service was completed by leaving a copy at 1020 Hartley. The date of service is indicated as being October 18, 1978. Thereafter, defendant filed a special appearance in the Municipal Court for the purpose of arguing that personal jurisdiction had not been obtained over the defendant. Thereafter, defendant filed a suggestion in bankruptcy and further proceedings in the Municipal Court have been stayed.

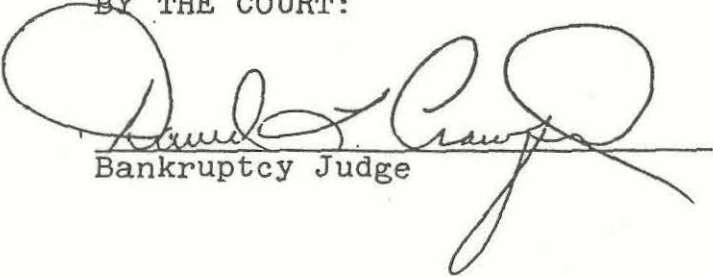
The stipulation indicates that defendant at the time of the service was residing at 1420 South 7th Street, Lincoln, Nebraska, and had been living there since approximately August of 1978. The address of 1020 Hartley, Lincoln, Nebraska, is the residence of the defendant's mother. Although defendant had lived there sometime in 1972, he apparently has not lived there since.

Under Nebraska law, an action on negligence must be brought within four years of the accident. Service on summons may be had by leaving at the defendant's usual place of residence. An action under Nebraska law is deemed commenced as to the defendant at the time the summons is served upon him.

I conclude that the summons issued in the Municipal Court action was not properly served upon the defendant because it was not served at this usual place of residence. Accordingly, the action is not deemed commenced in the Municipal Court and the statute of limitations has run. Resulting from the foregoing is the conclusion that the defendant's affirmative defense should be sustained and that the plaintiff be enjoined from proceeding on her cause of action against the defendant for the reason that the statute of limitations has run. A separate order is entered in accordance with the foregoing.

DATED: April 2, 1979.

BY THE COURT:


Bankruptcy Judge

Copies mailed to each of the following:

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